United States Department of Labor
Employees' Compensation Appeals Board

D.C., Appellant	)	
and	)	**Docket No. 14-1312**
	)	**Issued: May 6, 2015**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Honolulu, HI, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 19, 2014 appellant filed a timely appeal from an April 7, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established disability on or after June 14, 2010 as a result of his accepted November 4, 2009 employment injuries.

FACTUAL HISTORY

On December 8, 2009 appellant, then a 58-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on November 4, 2009 he was assaulted by a patient and sustained

[1] 5 U.S.C. § 8101 *et seq.*

injuries to the back, knees, and legs, as well as an exacerbation of his preexisting post-traumatic stress disorder (PTSD) related to a combat injury. He reported that on that date a patient became violent and struck a physician. Appellant moved behind the patient and pulled him back by his upper torso while at the same time security personnel charged the patient from the front, causing appellant and the patient to fall down hitting the headboard of the bed and the floor very hard. While on his knees on the floor, appellant struggled to control the patient who was violently punching and biting him until he was restrained several minutes later.

Appellant stopped work on November 4, 2009 and sought treatment with Dr. D. Scott McCaffrey, Board-certified in emergency medicine. In a November 5, 2009 medical report, Dr. McCaffrey diagnosed lumbar sprain with bilateral sciatica and bilateral leg abrasions. He released appellant to full-duty work as of November 9, 2009. Appellant was authorized for continuation of pay for intermittent wage loss through December 3, 2009.

By decision dated May 18, 2010, OWCP accepted appellant's claim for lumbar strain and bilateral knee abrasion. The decision noted that, while his physician had provided additional diagnoses of bilateral sciatica, annular tear, prepatellar contusion, chronic bursitis, and PTSD, the conditions were not accepted due to lack of medical evidence establishing causal relationship with the November 4, 2009 traumatic injury.

On January 28, 2010 appellant traveled to Vietnam and returned at the end of March 2010.[2]

In a June 9, 2010 diagnostic report, Dr. Darren Lum, a Board-certified diagnostic radiologist, reported that a magnetic resonance imaging (MRI) scan of the right and left knee revealed a horizontal undersurface cleavage tear involving the posterior horn of the medial meniscus.

In a June 14, 2010 medical report, Dr. McCaffrey diagnosed lumbar sprain with bilateral sciatica and L3-4 annular tear, bilateral leg abrasion with prepatellar contusion and chronic bursitis, bilateral knee sprain with medial posterior horn cartilage tears, and cervical sprain with C5-6 disc space narrowing. He placed appellant on modified duty by restricting work to three times per week on Mondays, Wednesdays, and Fridays.

In a June 15, 2010 diagnostic report, Dr. Ryan L. Arbritton, a Board-certified diagnostic radiologist, reported that a cervical x-ray revealed degenerative disc space narrowing and endplate osteophyte formation at C5-6 and left-sided C5-6 neural foraminal stenosis from unconvertebral spurring.

[2] The record reflects that, although appellant was released to full-duty work on November 9, 2009, he was not working and on travel from January 28, 2010 through the end of March 2010. On January 20, 2009, prior to traveling to Vietnam, Dr. McCaffrey issued a "Letter of Medical Necessity When Traveling" to avoid aggravation of injuries because appellant's neck, shoulders, elbows, back, hips, knees, and ankles' aching symptoms had not improved. On December 13, 2010 Dr. McCaffrey placed appellant off work from January 7, 2011 through April 29, 2011 for herbal medicine alternative medical treatment which he would be receiving in Vietnam. Appellant again traveled to Vietnam from January 7 to April 29, 2011. He stopped work on January 7, 2011 and did not return, filing CA-7 forms for continuous disability compensation beginning on that date.

On July 8, 2010 appellant filed claim for compensation CA-7 forms for intermittent periods of disability beginning November 5, 2009.

Dr. McCaffrey completed a September 3, 2010 work capacity evaluation wherein he indicated that appellant could not perform his usual job and had numerous work restrictions including sitting, walking, standing, and operating a motor vehicle for up to one hour a day.

In a November 16, 2010 medical report, Dr. McCaffrey modified appellant's work to two times per week, on Tuesdays and Thursdays, due to a flare up of his condition. He provided additional diagnoses of bilateral shoulder dysfunction, bilateral ankle sprain with dysfunction, bilateral calcaneal fractures, bilateral shoulder superior labrum from anterior to posterior (SLAP) lesions with rotator cuff tear, and bilateral elbow desiccation.

By letter dated February 4, 2011, OWCP informed appellant that the medical evidence of record was insufficient to support his claim for compensation. Appellant was advised to submit medical evidence establishing disability for the periods claimed. In response, he submitted numerous diagnostic and medical reports.

By decision dated April 15, 2011, OWCP denied appellant's claim for wage-loss benefits as of June 14, 2010 finding that the medical evidence failed to establish a material worsening of his accepted conditions due to the accepted November 4, 2009 work injury.

In a May 2, 2011 medical report, Dr. McCaffrey placed appellant off work from January 7 through May 9, 2011, noting that he would be released to modified duty effective May 10, 2011.

On May 11, 2011 appellant requested review of the written record before the Branch of Hearings and Review. In support of his claim, he submitted narrative statements and additional medical and diagnostic reports documenting his treatment.

In a May 16, 2011 medical report, Dr. McCaffrey provided 14 different diagnoses pertaining to the back, neck, ankles, legs, knees, elbows, shoulders, and mental health.[3] He opined that appellant's diagnoses were caused by the November 4, 2009 employment incident, noting that he had no prior injuries to any of these areas and had been suffering from severe pain and impairment since the injury. Dr. McCaffrey stated that appellant resumed full-duty work for

[3] Dr. McCaffrey provided the following diagnoses: lumbar sprain with bilateral sciatica and L3-4 annular tear; bilateral leg abrasions with prepatellar contusion and chronic persistent bursitis, bilateral knee sprain with medial posterior horn cartilage tears, cervical sprain with C5-6 disc derangement and mild listhesis with osteophyte complex and facet degenerative arthritis, bilateral ankle sprain with probable talar dome fracture and small fragment displacement on the left and talar dome marrow edema with tibialis posterior tenosynovitis and medial tibia cartilage articular defects, right shoulder sprain with SLAP tear and partial thickness articular surface tear of the supraspinatus with adjacent tendinopathy, left shoulder sprain with supraspinatus, infraspinatus partial thickness tears and SLAP tear extending into the biceps labral anchor from posterior to anterior, right knee sprain with horizontal oblique tear of the posterior horn of the medial meniscus, left knee sprain with horizontal cleavage tear of the posterior horn of the medial meniscus with extrusion, lumbar sprain with annular tears of the right portion of the disc at the L3-4 and L4-5 levels, left elbow sprain with chronic persistent medial epicondylitis, right elbow sprain with mild medial epicondylitis with edema in the common flexor tendon, mild PTSD secondary to injury, and chronic persistent pain-related sleep disorder.

the first three months subsequent to the injury and was later reduced to light-duty secondary to chronic ongoing pain from the noted injuries. He stated that appellant's modified-duty work schedule allowed for his physical therapy and treatment so that he could remain active in the workplace.

Dr. McCaffrey completed a work capacity evaluation on June 6, 2011 wherein he noted appellant's restrictions, including sitting, walking, and standing for 20 minutes at a time, but confirmed he could work for eight hours a day with restrictions. Dr. McCaffrey related that appellant had severe chronic pain and MRI scans showed several severe joint sprains, derangements, and fractures.

A memorandum dated June 14, 2011 by a nurse manager at the employing establishment documented a meeting that day wherein appellant's April 15, 2011 denial of compensation was discussed. The memorandum documented that he had been informed that the modified duty he had been performing would no longer be available. Effective June 15, 2011 appellant would be placed on leave without pay pending the outcome of his workers' compensation appeal, or a release to full duty without restrictions by his physician.

In a July 9, 2011 report, Dr. McCaffrey stated that appellant was off duty due to withdrawal of light-duty work from the employing establishment on June 15, 2011.

By medical report dated July 11, 2011, Dr. Gary Okamura, a Board-certified orthopedic surgeon, reported that he was evaluating appellant for injuries sustained from a November 4, 2009 work injury. He diagnosed bilateral knee medial meniscal tears and recommended arthroscopic knee surgery. Dr. Okamura further noted SLAP tears to the shoulders which also required surgery.

On August 24, 2011 OWCP expanded the claim to include the conditions of bilateral knee sprain, bilateral shoulder sprain, bilateral ankle sprain, and cervical strain. It noted that, although an arthroscopic surgery had been requested for bilateral meniscus tears, a second opinion was warranted before any further determination could be made.

By decision dated September 22, 2011, the Branch of Hearings and Review set aside the April 15, 2011 decision and remanded the case for additional medical development. The hearing representative noted that OWCP denied appellant's claim for disability on the basis that it was unclear how the various new conditions claimed were work related or what material change occurred such that appellant would have been able to work full duty through May 2010, but then become increasingly disabled. It noted that subsequent to the April 15, 2011 decision, OWCP expanded the claim to include additional conditions and as such, the case should be remanded to a second opinion physician for examination and opinion on appellant's work-related injuries and periods of disability.

Appellant submitted an August 13, 2011 psychiatric report from Dr. Danilo E. Ponce, a treating physician, who diagnosed PTSD chronic as a Vietnam Veteran which he opined was acutely exacerbated by the November 4, 2009 employment incident. He also submitted a September 6, 2011 report from Dr. McCaffrey, which placed him on modified duty and a September 26, 2011 report which removed him from duty.

In an October 3, 2011 report, addressed to the employing establishment, Dr. McCaffrey noted that he had completed several functional capacity evaluations and therefore the employing establishment was aware that appellant had persistent pain due to derangement of the neck, back, bilateral shoulders, elbow, knee, ankle, and heels, as well as aggravation of preexisting PTSD since November 4, 2009. He stated that sedentary work requiring excessive sitting was not recommended. Dr. McCaffrey concluded that the job description provided was not appropriate and could aggravate his condition.

On February 7, 2012 OWCP referred appellant, the case file, a statement of accepted facts (SOAF), and a series of questions to Dr. Tetsuto Numata, a Board-certified orthopedic surgeon, for a second opinion examination and opinion on appellant's work-related injuries and disability.

In his March 23, 2012 report, consisting of 42 pages, Dr. Numata provided a detailed summary of prior medical and diagnostic reports and findings on physical examination. Appellant reported no injuries or problems pertaining to his back, bilateral knees, neck, bilateral shoulders, bilateral elbows, bilateral hips, bilateral ankles, and bilateral heels prior to the November 4, 2009 work injury. Dr. Numata provided a history of the employment incident stating that the physical altercation that occurred was violent and uncontrolled. He noted that appellant fell back to the floor while holding the patient who was struggling against the bed, and continued to struggle in an uncontrolled manner until the patient was subdued. Based on the mechanism of injury, Dr. Numata noted that it was plausible that a mechanical injury could have occurred in the neck, lower back, bilateral knees, bilateral shoulders, and bilateral ankles.

Dr. Numata provided diagnoses of right knee medial meniscus tear, left knee medial meniscus tear, lumbar annular tear at L3-4 and L4-5 discs, right ankle ligament sprain, right articular cartilage tear, right ankle posterior tibial tendinitis, right calcaneal nondisplaced fracture, bilateral shoulder SLAP tear, bilateral shoulder supraspinatus, left shoulder subscapularis partial tear, and bilateral elbow mild medial epicondylitis. He further noted the preexisting conditions of right elbow osteoarthritis, cervical multilevel degenerative spondylosis, bilateral shoulder acromioclavicular (AC) joint arthropathy, left ankle osteochondral lesion medial dome of talus and degenerative articular cartilage, and damage in the tibia plafond.

Dr. Numata noted that while complaints to the low back and bilateral knees were documented since the onset of injury, complaints to the neck, shoulders, elbows, and ankles were not documented for nearly seven months after the initial injury. Thus, he opined that injuries sustained to the neck, shoulders, elbows, and ankles were not directly related to the work injury. Dr. Numata further opined that appellant's bilateral knee medial meniscus tear and lumbar annular tear at L3-4 and L4-5 discs as documented by MRI scan were directly caused by the work-related accident. He stated that appellant's preexisting conditions of right elbow osteoarthritis, cervical multilevel degenerative spondylosis, bilateral shoulder AC joint arthropathy, left ankle osteochondral lesion medial dome of talus and degenerative articular cartilage, and damage in the tibia plafond were aggravated by the work injury. Dr. Numata stated that the aggravation was permanent as it was beyond the period of time since the work injury where the aggravation would normally have ceased.

When asked if appellant's two trips to Vietnam, which entailed a 13-hour flight one way, caused or aggravated his conditions, Dr. Numata stated that no records were provided to render an opinion on the issue. When asked if the 13-hour flight to Vietnam was responsible for any periods of disability, he responded that the medical records did not indicate that the flights themselves led to reduction of appellant's work capacity or status. Dr. Numata noted that Dr. McCaffrey reduced appellant' workload beginning June 14, 2010 and speculated that this could have been done due to appellant's reports of worsening of his condition over time. He stated that review of medical records did not identify a material change that occurred on or about June 2010 which would cause the change in his work capacity. Dr. Numata further noted that Dr. McCaffrey placed appellant off duty effective January 7 through May 9, 2011. The medical records revealed that Dr. McCaffrey placed appellant off duty due to the employing establishment's lack of accommodation of his modified-duty status. Dr. Numata stated that it appeared that appellant had modified work-duty capacity since May 10, 2011.

Dr. Numata opined that appellant was suffering from residuals of the work injury pertaining to his bilateral shoulders and knees. He further stated that, if OWCP were to accept causal relationship, appellant was suffering from residuals of the work injury related to the cervical spine and bilateral elbows, but no residuals for the bilateral ankles. Dr. Numata recommended that OWCP approve bilateral knee surgery and shoulder arthroscopic surgery. He stated that the work injury more likely than not caused the damage to the bilateral knee structure identified by MRI scan based on time line of injury and symptoms. With respect to the bilateral shoulder surgery, Dr. Numata stated that OWCP would need to decide administratively if the injury should be covered. He concluded that appellant could work in a modified-duty capacity with restrictions of lifting, bending, twisting, squatting, climbing, pushing, and pulling with the ability to change positions from sitting, standing, and walking freely.

By letter dated May 17, 2012, OWCP requested a supplemental report from Dr. Numata and provided additional questions for clarification. It noted that he stated that appellant's complaints to the neck, bilateral shoulders, bilateral elbows, and bilateral ankles were not directly related to the work injury as there were no documented complaints of symptoms until seven months later. However, Dr. Numata later stated that appellant's right elbow, cervical, bilateral shoulder, and left ankle conditions were aggravated by the work injury.

In a July 9, 2012 report, Dr. Numata responded to an OWCP questionnaire and stated that the preexisting conditions could not be directly related to the work injury. He further stated that the neck, bilateral shoulders, bilateral elbows, and bilateral ankles were not caused or aggravated by the work injury because there was no documentation of symptoms until seven months after the initial injury. Dr. Numata stated that appellant's bilateral ankle sprains and cervical sprain had resolved but the bilateral shoulder issues had not resolved. He explained that, based on loss of motion examination findings, appellant suffered from residuals of the work-related lumbar strain. Dr. Numata noted that appellant was suffering from residuals of his lumbar strain, rather than his degenerative disc disease, because the lumbar strain was significantly more likely to have occurred as a result of the physical activities involved in the work injury. He stated that he was unsure why appellant could not work full duty after May 10, 2011 and was off continuously after January 7, 2011, but speculated that this was because of appellant's complaints that his condition was slowly worsening over time, lack of accommodation by the employing establishment, and reduction of work pending completion of a surgical work up. Dr. Numata

noted that Dr. McCaffrey noted no objective material medical changes to indicate why appellant was unable to work full duty after May 10, 2011.

By decision dated August 24, 2012, OWCP denied appellant's claim for disability compensation for the period beginning June 14, 2010 and continuing based on the reports of Dr. Numata serving as the second opinion physician. It further noted that appellant was also not entitled to disability compensation beginning June 15, 2011 due to his employing establishment withdrawal of light duty because there was no objective medical evidence to establish a material change in his condition that rendered him unable to continue working full duty after June 14, 2010.

On August 31, 2012 appellant requested an oral hearing before the Branch of Hearings and Review. In support of his claim, he submitted additional medical reports dated October 20, 2012 through January 20, 2014.

By letter dated August 31, 2012, OWCP requested another supplemental report from Dr. Numata for clarification of his prior answers. It provided him additional questions for response. OWCP further requested that Dr. Numata explain how the tears in the bilateral knees were related to the November 4, 2009 injury and not the result of his nonindustrial travel and activities while in Vietnam.

In an October 20, 2012 medical report, Dr. McCaffrey stated that he reviewed Dr. Numata's March 23 and July 9, 2012 medical reports. He stated that he concurred with many of Dr. Numata's examination findings and noted that appellant's subjective complaints of pain were consistent with the structural damage proven by high resolution MRI scan tomography. Dr. McCaffrey noted that surgery to the knees and shoulders had been recommended since July 2011, but had not been approved. Appellant's tears and derangements would likely not heal without surgery and the injuries were consistent with the mechanism of injury, appellant's pain self-portraits taken on multiple office visits, and objective physical examination findings. Dr. McCaffrey further stated that, despite recommending otherwise, appellant insisted on going back to work five days after his initial injury due to his impeccable attendance record. He stated that, due to the severe nature of the multiple orthopedic traumas, appellant was unable to persist in full-duty capacity, resulting in time off and subsequently light-duty status. Dr. McCaffrey noted that appellant's light duty was withdrawn by the employing establishment on June 15, 2011. He explained that appellant severely injured multiple joints of his body as a result of the November 4, 2009 employment incident and without the opportunity to undergo reparative surgery, he was unable to return to work in a full-duty capacity, which undermined his recovery.

In a November 20, 2012 addendum report, Dr. Numata responded to OWCP's August 31, 2012 request for additional information. He stated that tears in the bilateral knees were documented from a June 9, 2010 MRI scan. Dr. Numata explained with detail that the mechanism of injury, persistent symptoms since the injury, and physical examination findings were consistent with the MRI scan findings. Coupled with lack of documented new injury, it was more likely than not that the meniscus tears were caused by the work injury. Dr. Numata further stated that there was lack of any documentation of a new injury or worsening of symptoms to conclude that the travel to Vietnam caused the tear of the meniscus. He further

responded to OWCP's letter which questioned whether degenerative tears, as shown on the MRI scan, would be the result of a traumatic event. Dr. Numata explained that a one-time traumatic event could produce a tear in a meniscus that was already degenerated. Thus, even in a meniscus that is degenerated, if the onset of symptoms followed a clear mechanism of injury that was consistent as a potential cause of the tear, then one could opine that the tear was caused by that injury. Dr. Numata noted while it was possible that the degenerative tear was already present in the knee prior to the work injury, the work injury would have caused an aggravation of the condition.

In a July 23, 2013 medical report, Dr. Okamura reported that appellant required bilateral knee arthroscopy and bilateral shoulder and bicep arthroscopy.

By letter dated August 6, 2013, OWCP requested that appellant provide his treating physician with the reports of Dr. Numata for an opinion regarding his requests for surgery.

On August 20, 2013 OWCP approved appellant's request for bilateral knee arthroscopic surgery.[4]

In an August 23, 2013 report, Dr. McCaffrey responded to OWCP's August 6, 2013 letter. He provided a detailed history of the November 4, 2009 employment incident and stated that, based on the manner of the event, appellant sustained injuries to his neck, shoulders, elbows, back, hips, knees, and ankles.

Dr. McCaffrey disagreed with Dr. Numata pertaining to the lack of documented complaints relating to the neck, shoulders, elbows, and ankles for nearly seven months after the injury. He noted that, when he first treated appellant on November 5, 2009, his main focus was his back and knees as he was optimistic that the pain in other areas would go away. By report dated January 4, 2010, Dr. McCaffrey advised appellant that full duty was not recommended due to continued pain in his neck, shoulders, elbows, hips, and ankles, but appellant declined stating that he would get rest during his trip to Vietnam. On January 20, 2009, prior to traveling to Vietnam, appellant's neck, shoulders, elbows, back, hips, knees, and ankles' aching symptoms did not improve. In order to avoid aggravation, a "Letter of Medical Necessity When Traveling" was issued due to the 10-hour nonstop flight to Vietnam. Dr. McCaffrey stated that appellant's March 30, 2010 bilateral knee MRI scan request was not authorized until June 9, 2010, which worsened his work injuries and added to his depression and stress. He explained that appellant was asymptomatic and fully functional at the time of the November 4, 2009 injury with no prior complaints of pain, problems, or symptoms related to his neck, shoulders, low back, hips, knees, or ankles.

Dr. McCaffrey explained that appellant worked from November 9, 2009 through May 10, 2010, having only taken off three days due to aggravation of his work injury. Beginning May 10, 2010, the employing establishment disregarded the work capacity evaluation and required that appellant work in various units he was not confident or experienced in, exposing him to an environment where he felt physically threatened. This type of work further aggravated

[4] The Board notes that appellant underwent surgery on August 28, 2013 and received wage-loss compensation from August 28, 2013 on the periodic rolls.

his physical and psychological conditions. On June 14, 2010 Dr. McCaffrey reduced appellant's workdays to three times per week, noting complaints of continued aching and burning in the neck, shoulders, elbows, lower back, hips, knees, and heels which were aggravated by the aforementioned work conditions. By November 16, 2010, appellant's lower extremities were swollen, aching, and burning. The pain in his neck, shoulders, elbows, lower back, hips, knees, and heels became unbearable and his work duty was further reduced to two days per week. Dr. McCaffrey explained that appellant's conditions persisted because the employing establishment was not following the provided work capacity evaluation and he continued to work until his position was withdrawn by his employing establishment on June 15, 2011. He concluded that appellant continued to suffer from multiple orthopedic derangements.

A hearing was held on January 17, 2014 where appellant and his wife testified in support of his claim.

By decision dated April 7, 2014, the Branch of Hearings and Review affirmed the August 24, 2012 OWCP decision finding that the medical evidence failed to establish that appellant was disabled on or after June 14, 2010 as a result of his November 4, 2009 work injury. The hearing representative noted that the reports of Dr. Numata, serving as the second opinion physician, were speculative on the issue of causation and several attempts were made for clarification to no avail. She further noted that Dr. McCaffrey's medical reports were a reiteration of his earlier narratives and offered no new medical rationale establishing the claimed disability in light of appellant continuing to work full duty for over six months following the injury.

LEGAL PRECEDENT

Under FECA,[5] the term disability is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.[6] Whether a particular injury causes an employee to be disabled and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative, and substantial medical evidence.[7] Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements consist only of a repetition of the employee's complaints that excessive pain caused an inability to work, without making an objective finding of disability, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[8] The Board will not require OWCP to pay compensation for disability without any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[9]

[5] *Supra* note 1.

[6] *See Prince E. Wallace*, 52 ECAB 357 (2001).

[7] *See Fereidoon Kharabi*, 52 ECAB 291, 293 (2001); *Edward H. Horton*, 41 ECAB 301, 303 (1989).

[8] *G.T.*, 59 ECAB 447 (2008).

[9] *Id.*

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a light-duty position or the medical evidence establishes that he or she can perform the light-duty position, the employee has the burden of establishing by the weight of the evidence that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[10]

OWCP is not a disinterested arbiter but rather performs the role of adjudicator on the one hand and gatherer of the relevant facts and protector of the compensation fund on the other, a role that imposes an obligation to see that its administrative processes are impartially and fairly conducted.[11] Although the employee has the burden of establishing entitlement to compensation, OWCP shares responsibility in the development of the evidence.[12]

ANALYSIS

OWCP accepted that appellant sustained a lumbar strain, bilateral knee abrasion, bilateral knee sprain, bilateral shoulder sprain, bilateral ankle sprain, and cervical strain due to the November 4, 2009 employment incident. It subsequently approved his bilateral knee arthroscopic surgery. Appellant has the burden of proving by the weight of the substantial, reliable and probative evidence a causal relationship between his claimed disability beginning June 14, 2010 and the accepted November 4, 2009 work injuries.[13] The Board finds this case is not in posture for decision.

OWCP referred appellant and the case file to Dr. Numata, a Board-certified orthopedic surgeon, for a second opinion and examination pertaining to his work-related injuries and disability. Following Dr. Numata's March 23, 2012 report, it requested two additional reports with questions for clarification. Dr. Numata submitted reports dated March 23, July 9, and November 20, 2012 responding to OWCP's requests.

In his initial March 23, 2012 report, consisting of 42 pages, Dr. Numata provided detailed summary of prior medical and diagnostic reports, findings on physical examination, description of the November 4, 2009 injury, and medical history with no prior complaints or problems. He provided various diagnoses and also noted preexisting diagnoses.[14] Dr. Numata opined that

[10] *See Terry R. Hedman*, 38 ECAB 222 (1986).

[11] *Richard F. Williams*, 55 ECAB 343, 346 (2004); *Thomas M. Lee*, 10 ECAB 175, 177 (1958).

[12] *D.N.*, Docket No. 07-1940 (issued June 17, 2008); *Mary A. Barnett*, 17 ECAB 187, 189-90 (1965).

[13] *See Amelia S. Jefferson*, 57 ECAB 183 (2005).

[14] Dr. Numata provided diagnoses of right knee medial meniscus tear, left knee medial meniscus tear, lumbar annual tear at L3-4 and L4-5 discs, right ankle ligament sprain, right articular cartilage tear, right ankle posterior tibial tendinitis, right calcaneal nondisplaced fracture, bilateral shoulder SLAP tear, bilateral shoulder supraspinatus, left shoulder subscapularis partial tear, and bilateral elbow mild medial epicondylitis. He further noted the preexisting conditions of right elbow osteoarthritis, cervical multilevel degenerative spondylosis, bilateral shoulder AC joint arthropathy, left ankle osteochondral lesion medial dome of talus and degenerative articular cartilage, and damage in the tibia plafond.

injuries sustained to the neck, shoulders, elbows, and ankles were not directly related to the work incident because complaints to these areas were not documented until nearly seven months after the initial injury. He opined that appellant's bilateral knee medial meniscus tear and lumbar annular tear at L3-4 and L4-5 discs as documented by MRI scan were directly caused by the work-related accident. Dr. Numata further stated that the diagnosed preexisting conditions were aggravated by the work injury.

Dr. Numata opined that appellant was suffering from conditions caused by the work injury pertaining to his lower back and knees. He recommended arthroscopic knee surgery and modified work duty.[15] Dr. Numata further stated that appellant had conditions of the cervical spine, bilateral elbows, and bilateral shoulders, which required arthroscopic shoulder surgery should OWCP accept the conditions as work related. He speculated that Dr. McCaffrey reduced appellant's workload/placed him off duty due to reports of worsening of his condition over time and lack of accommodation by the employing establishment. Dr. Numata stated that review of medical records did not identify a material change that occurred on or about June 2010 which would cause the change in appellant's work capacity and opined that he had modified work-duty capacity since May 10, 2011.

In a July 9, 2012 addendum report, Dr. Numata responded to OWCP questionnaire and stated that the preexisting conditions could not be directly related to the work injury. He explained that appellant was suffering from his lumbar strain, rather than his degenerative disc disease, because the lumbar strain was significantly more likely to have occurred as a result of the physical activities involved in the work injury. Dr. Numata stated that he was unsure why appellant was off duty continuously after January 7, 2011 and could not work full duty after May 10, 2011, but speculated that this was because of appellant's complaints that his condition was slowly worsening over time, lack of accommodation by the employing establishment, and pending surgical workup.

In another addendum report dated November 20, 2012, Dr. Numata responded to OWCP's request for additional information. He stated that the meniscus tears in the knee were caused by the work injury and not degeneration, as documented by a June 9, 2010 MRI scan and consistent with appellant's history, symptoms, timing, mechanism of injury, and lack of intervening trauma which was well documented in the medical records.

The reports of Dr. McCaffrey, appellant's treating physician, provided 14 different diagnoses pertaining to the back, neck, ankles, legs, knees, elbows, shoulders, and mental health which he opined were caused by the November 4, 2009 employment incident.[16] He explained that appellant was asymptomatic and fully functional at the time of the November 4, 2009 injury with no prior complaints of pain, problems, or symptoms related to his neck, shoulders, low back, hips, knees, or ankles. Dr. McCaffrey reviewed the reports of Dr. Numata and disagreed that there were no documented complaints related to the neck, shoulders, elbows, and ankles

[15] Dr. Numata noted that appellant could work modified duty with restrictions of lifting, bending, twisting, squatting, climbing, pushing, and pulling with the ability to change positions from sitting, standing, and walking freely.

[16] *Supra* note 2.

until nearly seven months after the initial injury. He provided an explanation detailing why appellant was provided modified duty for specific periods and restricted from returning to work full duty for other periods, despite having been released to full duty on November 9, 2009.[17] Dr. McCaffrey explained that appellant's work restrictions and disability were modified as his complaints worsened over time. He indicated that MRI scan studies confirmed worsening of appellant's condition. Dr. McCaffrey further stated that OWCP failed to approve the proper tests and treatments in a timely manner which caused appellant's condition to worsen as he was not approved for his required surgeries. He also stated that the employing establishment was not following appellant's work limitations, which aggravated his conditions, and withdrew light duty as of June 15, 2011, rendering him unable to return to work.

OWCP's April 7, 2014 decision found the reports of Dr. Numata, serving as the second opinion physician, to be speculative on the issue of causation despite several attempts for clarification. The hearing representative noted that Dr. Numata's opinion was speculative because the physician advised that the tears revealed in the MRI scan were degenerative but may have been aggravated by the work incident. Contrary to OWCP's assertion, the Board does not find Dr. Numata's opinion speculative in this regard. Dr. Numata explicitly stated that appellant's tear of the meniscus was caused by the November 4, 2009 work injury, explaining that even if the meniscus was degenerated, the tear was caused by the traumatic injury based on timing, mechanism of injury, and symptomatic history which were well documented in medical records. Moreover, if the hearing representative found the reports of Dr. Numata to be speculative, it is OWCP's obligation to seek clarification and obtain a report which adequately address the issues that it sought to develop.[18]

The Board notes that appellant's bilateral knee meniscus tears were documented by a June 9, 2010 MRI scan, which both Dr. Numata and Dr. McCaffrey attributed to the

[17] Dr. McCaffrey explained that, on November 5, 2009, appellant's main focus was his back and knees as he was optimistic that the pain in other areas would go away. By January 4, 2010, he advised appellant that full duty was not recommended due to continued pain in his neck, shoulders, elbows, hips, and ankles but appellant declined stating that he would get rest during his trip to Vietnam. On January 20, 2009 prior to traveling to Vietnam, appellant's neck, shoulders, elbows, back, hips, knees, and ankles' aching symptoms did not improve. In order to avoid aggravation, a "Letter of Medical Necessity When Traveling" was issued due to the 10-hour nonstop trip to Vietnam. Dr. McCaffrey explained that appellant worked from November 9, 2009 through May 10, 2010, having only taken off three days due to aggravation of his work injury. Beginning May 10, 2010, the employing establishment disregarded the work capacity evaluation, which further aggravated appellant's physical and psychological conditions. Dr. McCaffrey stated that appellant's March 30, 2010 bilateral knee MRI scan request was not authorized until June 9, 2010. On June 14, 2010 he reduced appellant's workdays to three times per week, noting that he complained of continued aching and burning in the neck, shoulders, elbows, lower back, hips, knees, and heels, which was aggravated by the employer's lack of accommodations. By November 16, 2010, appellant's lower extremities were swollen, aching, and burning. The pain in his neck, shoulders, elbows, lower back, hips, knees, and heels became unbearable and his work duty was further reduced to two days per week. Dr. McCaffrey explained that appellant's conditions persisted because the employing establishment was not following the provided work capacity evaluation and he continued to work until his position was withdrawn by his employing establishment on June 15, 2011. He concluded that appellant continued to suffer from multiple orthopedic derangements which were caused by the work injury.

[18] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9(j) (September 2010). Only if the second opinion physician does not respond, or does not provide a sufficient response after being asked, should the claims examiner request scheduling with another physician.

November 4, 2009 work injury. Appellant claims disability compensation beginning June 10, 2010, the date following his MRI scan which revealed these meniscus tears. He did not undergo surgery for this condition until August 28, 2013. As OWCP approved this surgery and both physicians relate it to the November 4, 2009 work injury, it should determine whether the claim should be expanded to include this bilateral knee condition and whether it caused disability beginning June 10, 2010.

Moreover, Dr. Numata has unequivocally stated that appellant's lumbar and bilateral knee conditions were caused by the work injury and he continued to suffer from residuals of these injuries. He provided a detailed review of medical and diagnostic reports and explained the mechanism of injury pertaining to these work-related diagnoses. Dr. Numata responded multiple times to OWCP's inquiries regarding appellant's travel to Vietnam and has been steadfast in his opinion that the medical records did not indicate that his conditions were caused or aggravated by his travel nor did the travel lead to reduction of his work capacity or status. With respect to disability during the periods in question, he speculated that Dr. McCaffrey placed appellant on modified duty, and later off duty, due to complaints of worsening of his condition, lack of employing establishment accommodation, and pending surgical workup. Dr. Numata stated that it appeared that appellant had modified work-duty capacity since May 10, 2011.

As such, the Board further finds that there is no conflict of medical opinion between the opinion of Dr. Numata and Dr. McCaffrey. The record reflects that both Dr. Numata and Dr. McCaffrey agree that appellant continued to suffer from residuals of his lumbar and bilateral knee conditions which were causally related to the November 4, 2009 work injury. Dr. McCaffrey further opined that appellant's neck, bilateral shoulder, bilateral elbow, and bilateral ankle conditions were also caused by the November 4, 2009 work injury which resulted in continued disability. While there is no conflict, the issue remains as to whether appellant was disabled beginning June 10, 2010 as a result of the November 4, 2009 injury.[19]

Thus, the Board finds that further development is required to determine whether appellant was disabled due to the November 4, 2009 injury.[20] On remand, OWCP should prepare a statement of accepted facts which includes the specific employment-related conditions accepted by OWCP, any recurrence of disability, a detailed employment history, specific functions performed by appellant, restrictions imposed by appellant's treating physicians, and surgeries and medical treatment authorized by OWCP. It should determine what work restrictions were provided by appellant's physician for the period in question, the modified duty provided by the employing establishment, and whether/when modified duty was withdrawn. OWCP should further develop the medical evidence and refer appellant to another appropriate Board-certified specialist for a new second opinion examination and rationalized opinion as to whether appellant's injuries were causally related to the November 4, 2009 work incident, either directly or through aggravation, precipitation, or acceleration. It should determine whether appellant is entitled to compensation for disability, whether he is partially or totally disabled, whether he was

[19] *E.P.*, Docket No. 14-1298 (issued January 7, 2015).

[20] *D.N.*, Docket No. 09-651 (issued April 20, 2010).

totally disabled from June 10, 2010, and whether the claim should be expanded to include additional conditions.[21]

For the above-noted reasons, the case will be remanded to OWCP to enable it to properly consider all of the evidence and develop the medical evidence. Following such further development as OWCP deems necessary, it shall issue an appropriate merit decision on appellant's claim.[22]

CONCLUSION

The Board finds that this case is not in posture for a decision as to whether appellant had any disability on or after June 10, 2010 as a result of his accepted November 4, 2009 employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the April 7, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion of the Board.

Issued: May 6, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[21] *Id.*

[22] *H.G.*, Docket No. 09-512 (issued October 2, 2009).